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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~745~~ 24

SAM ROSENZWEIG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The petitioner, Sam Rosenzweig, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered October 4, 1966.

Opinions Below

The opinion of the Court of Appeals (App., *infra*, A-1) has not yet been officially reported. The opinion of the District Court is reported at F. Supp.

Jurisdiction

The judgment of the Court of Appeals was entered on October 4, 1966 (App., *infra*, A-4). The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented

(1) Whether a collector or pick-up man, who picks up money from bettors on a weekly basis, after the event has taken place is subject to the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a).

(2) Whether a collector or pick-up man who picks up money from bettors, on a weekly basis, after the event has taken place, and occasionally may give a telephone number or code name of an answering service to a friend or possible bettor is subject to the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a).

(3) Whether a collector or pick-up man who has no control of the employees of an answering service which accepts names and telephone numbers of people and pays no bills of the answering service becomes a principal and required to comply with the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a) if ultimately these people who left their names and telephone numbers are called back by some other person and a bet or wager is accepted.

(4) Whether a collector or pick-up man who has no control of persons who receive names and telephone numbers from an answering service and which persons later through the use of these names and telephone numbers obtain bets or wagers is required to comply with the provisions of 26 USC Sec. 4411 and 26 USC Sec. 4412(a).

Statutes Involved

TITLE 26, UNITED STATES CODE, SEC. 4401
SEC. 4401 IMPOSITION OF TAX

(a) WAGERS:

There shall be imposed on wagers, as defined in Sec. 4421, an excise tax equal to 10 percent of the amount thereof.

(b) AMOUNT OF WAGER:

In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) PERSONS LIABLE FOR TAX:

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

TITLE 26, UNITED STATES CODE, §4411
§4411 IMPOSITION OF TAX

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section

4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

TITLE 26, UNITED STATES CODE, §4412

§4412 REGISTRATION

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

TITLE 26, UNITED STATES CODE, §7203

§7203 WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined

not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

TITLE 26, UNITED STATES CODE, SECTION 7262

§7262. VIOLATION OF OCCUPATIONAL TAX LAWS RELATING TO WAGERING—FAILURE TO PAY SPECIAL TAX

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 51

EXCEPTION UNNECESSARY:

Exceptions to rulings or orders of the Court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time of the ruling or order of the court is made or sought makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of any objection does not thereafter prejudice him.

Statement

Petitioner was indicted as one engaged in the business of accepting wagers on horse races and failing to pay the special tax imposed by Title 26 USC Sec. 4411 Internal Revenue Code of 1954, in violation of Title 26 USC 7262 (Count 1) and with failing to supply and register his name and place of residence with the District Director of Internal Revenue as provided in Title 26 USC 4412(a) Internal

Revenue Code of 1954, in violation of Title 26 USC Sec. 7203 (Count 2).

Petitioner waived a trial by Jury.

In order to determine whether 26 USC 4411 and 26 USC 4412(a) require the payment of the special tax and registration by petitioner, it is necessary to examine the manner in which the bets or wagers on horse races were placed. The evidence produced by five (5) witnesses called by the respondent indicates the following:

The operator or principal, the one to whom the profits from the operation belong and who controls the set-up, is commonly referred to as the "banker" or "bookmaker" and his place of business as the "bank" or "horse rooms". Among those employed by the banker are the "answering service" which receives names and telephone numbers, "writers" who obtain names and telephone numbers from the "answering service" and make the calls to obtain a bet or wager and collectors or pick-up men who once a week collect the bets or wagers or pay the winnings after the events have taken place.

The player does not come into contact with the bank or banker or with the writer in placing his wager or in collecting his winnings or paying his bet or wager. Instead, he is visited once a week after the racing events have taken place to either receive his winnings or pay the sum bet or wagered.

The witnesses testified they would call a telephone number and an answering service would take their names and telephone numbers (R 9). That later in the day some person, not the petitioner, would call and the witnesses would place a bet or wager (R 9, 56, 80).

That at the end of the week the petitioner would either pay them money or collect money from them (R 16, 17, 58, 94).

The petitioner had no control over the employees of the answering service nor did he pay the rent or its telephone bills (R 190).

The petitioner had no control over the people that obtained the names and telephone numbers from the answering service in order for said persons to call and obtain the bet or wager (R 190).

The petitioner did not make application for any of the phone numbers used by the respondent's witnesses (R 190). Did not know the names of the horses upon whom bets were placed, nor the tracks where the horses were running (R 191).

Petitioner moved for judgment of acquittal contending that respondent failed to establish that petitioner, Sam Rosenzweig, was engaged in the business of accepting wagers on horses; that petitioner ever made a profit or loss from the wagers and that petitioner had been connected with the voice on the telephone.

Upon the foregoing evidence, petitioner was found guilty of both counts and fined $2000.00 on the first count and sentenced to one year in jail, sentence suspended and placed on probation for one (1) year.

The Court of Appeals affirmed the judgment of conviction.

Reasons for Granting the Writ

(1) The decision below was in direct conflict with the Third Circuit's decision in *United States* v. *Calamaro,* where the defendant who was a "pick-up" man of slips was held not to be a person engaged "in the business of accepting wagers and of conducting a wagering pool".

(2) There is a difference of opinion amongst the offices of the United States Attorney as to whether a collector is subject to the provisions of Title 26 USC Sec. 4411 and Title 26 USC Sec. 4412(a). The United States Attorney in this case argues that the petitioner who is the person who collects the proceeds of a wager or bet after the event has taken place must comply with the provisions of the USC above cited, while the United States Attorney in his brief in the case of *United States of America* v. *Calamaro* (Third Circuit), 354 U.S. 351, stated:

> "Upon examination of the act, it appears clear that the wager is not placed with the person who collects the wager from the patron, but is placed with the principal, that is the person who accepts the wager".

The tax which is involved in this case was added as one part of a comprehensive scheme to tax the receipts derived from the business of gambling.

Section 4411 USC requires each person, who is liable for the tax under Section 4401 USC or who is engaged in receiving wagers for or on behalf of any person so liable, to pay an excise tax equal to 10 percent of the amount thereof.

A wager is defined in Section 4421(A) and includes a wager placed in connection with horse racing. The said Section defines a wager as follows:

> "Any wager with respect to sports event or a contest placed with a person engaged in the business of accepting such wagers."

The petitioner was charged in the indictment as being "engaged in the business of accepting wagers on horse races and failed to pay the special tax imposed by Section 4411, Title 26, Internal Revenue Code of 1954."

The petitioner was charged as being the principal, i.e., the banker.

In H.R. Rep. No. 586, 82nd Cong., 1st Sess. 1951, the following statement appears (1951 U.S. Code Cong. & Admin. Serv. Vol. 2, p. 1839):

> "A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account . . ."

A similar statement is contained in Sen. Rep. 781, 82d Cong., 1st Sess. 1951 (1951 U.S. Code Cong. & Admin. Serv. Vol. 2, p. 2091).

The petitioner was at most a collector—an employee—rather than the person engaged in accepting wagers on horse races as a principal, he did not "accept wagers" within the meaning of the statute.

The Court held in *United States* v. *Calamaro,* 354 U.S. 351, decided June 17, 1957:

> "In normal usage of familiar language 'receiving wagers' is what someone on the 'banking' side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides of a single coin. You can't have one without the other. [The court here referred to the definition of 'wager' contained

> in § 3285 (b) (1) (C); note 1, supra.] Before the pick-up man enters the pictures, in such a case as we have here, the wager has been received physically by the writer and, in legal contemplation, by the writer's principal as well. The government recognizes—and in an appropriate case no doubt would insist—that what the writer does in relation to the bettor amounts to 'receiving a wager.' Thus, the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives."

No evidence whatsoever was produced by the government to show that the petitioner had any control over the telephone numbers used or the people who answered the telephones or that he paid any bills or salaries as necessarily are incurred in the operation of a business as vast as the government contends the defendant was engaged in.

The language has a clear, definite and well established meaning in our laws in the decisions of our courts and in everyday usage. The term "business" as used in the Internal Revenue Code was first defined by the Supreme Court of the United States in *Flint* v. *Stone Tracy Co.* (1910), 220 U.S. 107, 171, 55 L. Ed. 389, 421, as follows:

> " 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People ex rel. Hoyt v. Tax Comrs., 23 N.Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict. p. 273."

That definition by the Supreme Court was later repeated, affirmed and enlarged by the Supreme Court of the United States in *Von Baumbach* v. *Sargent Land Co.* (1916), 242 U.S. 503, 514, 61 L. Ed. 460, 467, as follows:

> "Were the respondents carrying on business, within the meaning of the Corporation Tax Act? This question was dealt with by this court in the first of the Corporation Tax Cases, Flint v. Stone Tracy Co., 220 U.S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. As the tax was there held to be assessed upon the privilege of doing business in a corporate capacity, it became necessary to inquire what it was to do business, and this court adopted with approval the definition judicially approved in other cases, which included within the comprehensive term 'business' 'that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.'"

It is essential that the Court construe 26 USC §4411 and 26 USC §4412(a) to resolve the questions presented pertaining to whether the collector whose only duty is to collect or pay money after the racing event has taken place is subject to the provisions thereof and therefore warrant a review by this Court.

CONCLUSION

For all of the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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